Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1503

SOCIALIST WORKERS PARTY, et al.,
Petitioners,

vs.

MARCH FONG EU, Secretary of State of the State of California,
Respondent.

Petition for Writ of Certiorari from the United States Court of Appeals for the Ninth Circuit

Brief in Opposition to Petition for Writ of Certiorari

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ISSUE

Should this Court grant a Petition for a Writ of Certiorari on a question of law, involving a fundamental political decision of the State of California regarding the ballot designations for candidates, which is at present at issue before the appellate judiciary of the State of California.

ARGUMENT

This Court in Accordance With the Discretionary Principles of Restraint Set Forth in Supreme Court Rule 19 Should Not Grant a Petition for a Writ of Certiorari on an Issue That Is Before the Appellate Judiciary of the State of California

This Court, in Rule 19 of the Supreme Court Rules, has stated that a Petition for Writ of Certiorari ". . . is not a

matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor". This Court has also expressed a general principle governing abstention that difficult questions of state law relating to fundamental state policy are a favored candidate for abstention. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 814 (1976). The respondent here does not argue for absention in the usual sense. This matter has been the subject of an opinion by the Ninth Circuit Court of Appeals. However, respondent argues that sound judicial discretion requires that the Petition not be granted for the reasons given below.

The issue which this Court must determine if it grants the Petition which is sought by the Libertarian Party for a writ of certiorari is the extent to which the judiciary, not the Legislature, has the authority to dictate to the states what must be printed on a ballot. California has a statutory scheme, developed from its indigenous political wisdom, that political parties must be strictly controlled in order to provide as much direct participation and democracy in their internal organization as possible. Parties, for example, are only permitted to nominate candidates for partisan office after a direct primary election where only registered party members have the right to cast their vote. California Elections Code section 10200.5. Appendix A.

California is not unduly restrictive of ballot access by parties who wish ballot designation in addition to a designation of their candidates. Any political organization with any significant modicum of support may easily qualify to have a direct primary and thus gain ballot designation. The easiest method is registration. California only requires that a new party demonstrate registration equal to one percent of the vote in the last gubarnatorial election. California Elections Code section 6430. Further, California has adopted postcard registration which requires no third party, deputy registrars and which provides for the cards, distributed free and with liberality, to be taken home by the voter or circulated by a new party without restriction. California Elections Code sections 500-512.

Candidates in California who are independent of any qualified political party are permitted to achieve ballot access for district, partisan elections by the circulation of a petition in which they need obtain signatures from registered voters equal only to three percent of the number of registered voters at the close of registration at the last general election. California Elections Code section 6831. Importantly, that petition may be signed by any voter whether or not he is registered with another political party or whether he in fact supports the party the candidate claims affiliation with. The only material restriction is that the person who signs the nomination paper not have signed the nomination paper of any other candidate for the same office. California Elections Code section 6838. In other words, for candidates who claim to represent a non-qualified party, California grants ready ballot access by permitting those candidates to be nominated by the electorate at large and not by the voters who register with that particular political party.

California provides that candidates who are not subject to the direct primary and who are thus nominated by the registered voters at large will be designated on their ballot as "Independent". California Elections Code section 10210. The Ninth Circuit Court of Appeals, in its opinion, held that California did not thereby substantially effect the fundamental right of voters to associate. The Ninth Circuit Court of Appeals held there was some effect upon such a

right but that the actual impact did not reach a magnitude that required a stricter test than that applied in *McDonald v. Board of Elections*, 394 U.S. 802 (1969).

A California trial court has reached the conclusion that California's electoral policy is satisfied if the candidates of a non-qualified party place the following statement on the petition which is circulated pursuant to the independent nomination procedure:

> ". . . is registered as, and is a member of, the Libertarian Party of California. He has been nominated for this office by the Libertarian Party of California and seeks to have his name identified on the ballot as a Libertarian Party Candidate."

Clearly, if this interpretation of California electoral policy is upheld by the California appellate judiciary, the California statutory scheme will have acquired a gloss which alters the assumption upon which the Ninth Circuit rendered its decision. The findings of fact and conclusions of law of that trial court (*Libertarian Party of California, et al. v. Olson, et al.*, Orange County Superior Court, Case No. 20-73-84 (cited by petitioners at page 7 of their Petition) are attached to this brief as Appendix B. The judgment of the trial court is attached to this brief as Appendix C.

The Secretary of State of the State of California, March Fong Eu, was a party to that action and has filed a notice of appeal. That notice of appeal is attached to this brief as Appendix D.

That appeal will unquestionably raise the same issues which are present before this Court in the Petition filed by the petitioners. Further, and not before this Court, will be California's interpretation of California law regarding the appropriate effect of the addendum to the independent nomination petition quoted above.

It must be noted that the issue raised in this Petition is totally unlike the issue before this Court in *Illinois State Board of Elections v. Socialist Workers Party*, —— U.S. ——, 99 S. Ct. 983 (1979). In that case, there was no question of ballot content or fundamental state policy regarding the difference between direct nomination of candidates as opposed to nomination by circulation of petition. The essential factual element was an irrational Illinois requirement which set forth higher requirements for qualification of a district party than for a statewide party. This Court did not hold that a partisan, district candidate is entitled to have the name of his party registration next to his name on the ballot as an absolute associational right.

CONCLUSION

There is no one ballot style for the states. There is no reason California cannot balance different systems of nomination and ballot designation. This Court has recognized that Caifornia need not, in light of its own political decisions, follow a particular electoral process. *Storer v. Brown*, 415 U.S. 724, 736 (1974). It is respectfully requested that this Court deny the Petition for a Writ of Certiorari and let the question of California ballot designation be determined by a California court.

DATED: April 20, 1979

GEORGE DEUKMEJIAN
Attorney General of the
State of California

CHARLTON G. HOLLAND
Deputy Attorney General

Attorneys for Respondent

Appendix A

§ 10200.5. Single form of ballot; partisan primary elections excepted

All voting shall be by ballot. There shall be provided at each polling place, at each election at which public officers are to be voted for, but one form of ballot for all candidates for public office, except that for partisan primary elections one form of ballot shall be provided for each qualified political party as well as one form of nonpartisan ballot. At such partisan primary elections each voter not registered as intending to affiliate with any one of the political parties participating in the election shall be furnished only a nonpartisan ballot. The nonpartisan ballot shall contain only the names of all candidates for nonpartisan offices and measures to be voted for at the primary election. Each voter registered as intending to affiliate with a political party participating in the election shall be furnished only a ballot of the political party with which he is registered and the nonpartisan ballot both of which shall be printed together as one ballot in the form prescribed by Section 10207.

Appendix B

Superior Court of the State of California for the County of Orange

No. 29-73-84

Libertarian Party of California, an unincorporated association, David Bergland, and Jim Gallagher,
Petitioners,

vs.

Al Olson, Registrar of Voters of Orange County, Keith Boyer, acting Registrar of Voters of San Diego County, and March Fong Eu, Secretary of State of the State of California,
Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The matter having been heard on September 11, 1978, in the courtroom of Department 13 before the Honorable Robert H. Green, judge presiding, petitioners LIBERTARIAN PARTY OF CALIFORNIA, DAVID BERGLAND, and JIM GALLAGHER submit the following Findings of Fact and Conclusions of Law pursuant to minute order of the above-entitled court, Department 13, dated September 13, 1978.

FINDINGS OF FACT

1. Petitioner DAVID BERGLAND is a candidate for the office of State Senate for the 36th Senatorial District in the State of California.

2. Petitioner JIM GALLAGHER is a candidate for the office of State Assembly for the 73rd State Assembly District in the State of California.

3. Petitioners DAVID BERGLAND and JIM GALLAGHER were nominated for the respective offices they are seeking by the Libertarian Party of California, an unincorporated association of citizens and voters in the State of California.

4. Petitioner DAVID BERGLAND has quaified to have his name placed on the general election ballot for the election to be held November 7, 1978, as a candidate for the State Senate from the 36th Senatorial District in the State of California, pursuant to the "independent nominations procedure" of the *California Elections Code*, §§ 6800 et seq.

5. Petitioner JIM GALLAGHER has qualified to have his name placed on the general election ballot for the election to be held November 7, 1978, as a candidate for the State Assembly from the 73rd State Assembly District in the State of California, pursuant to the "independent nominations procedure" of the *California Elections Code*, §§ 6800 et seq.

6. The Independent Nomination Paper petition sections which were circulated and submitted to the Registrar of Voters by petitioner DAVID BERGLAND each contained the following:

> "David Bergland is registered as, and is a member of, the Libertarian Party of California. He has been nominated for this office by the Libertarian Party of California and seeks to have his name identified on the ballot as a Libertarian Party Candidate."

7. Independent Nomination Paper petition sections which were circulated and submitted to the Registrar of Voters by petitioner JIM GALLAGHER each contained the following:

"Jim Gallagher is registered as a Libertarian and is a member of the Libertarian Party of California. He has been nominated for this office by the Libertarian Party of California and seeks to have his name identified on the ballot as a Libertarian Party Candidate."

8. Petitioners have demanded that the Secretary of State of California certify petitioners' names on the ballot with the party designation "Libertarian" and not as "Independents". Respondents refused to certify petitioners' political party designations on the ballot as "Libertarians".

9. Petitioners DAVID BERGLAND and JIM GALLAGHER were nominated for the respective offices they seek in the general election to be held November 7, 1978, by the Libertarian Party of California and the Libertarian Party of Orange County at duly held meetings in the County of Orange in accordane with the bylaws of the Libertarian Party of Orange County and the State of California.

10. Petitioners DAVID BERGLAND and JIM GALLAGHER have met the requirements of *California Elections Code* § 6831 by submitting nomination papers for the respective offices they seek signed by voters in their respective districts in excess of three percent (3%) of the entire number of registered voters in their respective districts.

11. The court finds that petitioners DAVID BERGLAND and JIM GALLAGHER have met the requirements of *California Elections Code* § 6831 and are entitled to have their names appear on the general election ballot for the general election November 7, 1978, as candidates for the respective offices that they seek.

12. The court finds that the voters who signed the nomination petitions in the respective districts in which petitioners seek office have been adequately informed and

notified that petitioners represent the Libertarian Party and are not seeking their respective offices as independent candidates.

CONCLUSIONS OF LAW

1. The court holds that petitioner DAVID BERGLAND is entitled to have his name placed on the general election ballot for the election to be held November 7, 1978, as a candidate for the California State Senate from the 36th Senatorial District, pursuant to *California Elections Code* § 6831.

2. The court holds that petitioner JIM GALLAGHER is entitled to have his name placed on the general election ballot for the election to be held November 7, 1978, as a candidate for the California State Assembly from the 73rd Assembly District, pursuant to *California Elections Code* § 6831.

3. Judgment is to be entered directing the issue of a peremptory writ of mandate commanding respondents to certify the name of DAVID BERGLAND as a candidate for the California State Senate from the 36th Senatorial District, with the political party designation "Libertarian" for the general election ballot for the election to be held November 7, 1978.

4. Judgment is to be entered directing the issue of a peremptory writ of mandate commanding respondents to certify the name of JIM GALLAGHER as a candidate for the California State Assembly from the 73rd Assembly District, with the political party designation "Libertarian" for the general election ballot for the election to be held November 7, 1978.

5. Any finding of fact herein which would constitute a conclusion of law shall be considered to be a conclusion of law, and any conclusion of law herein which could constitute a finding of fact shall be considered to be a finding of fact.

Dated: .....

.....
Judge of the Superior Court

Approved as to form.

Dated: .....

EVELLE J. YOUNGER
Attorney General

By: .....
CHRISTOPHER FOLEY
Deputy Attorney General

Appendix C

Superior Court of the State of California for the County of Orange

No. 29-73-84

Libertarian Party of California, an unincorporated association, David Bergland, and Jim Galagher,
Petitioners,

vs.

Al Olson, Registrar of Voters of Orange County, Keith Boyer, acting Registrar of Voters of San Diego County, and March Fong Eu, Secretary of State of the State of California,
Respondents.

JUDGMENT GRANTING PEREMPTORY WRIT OF MANDATE AND ORDER

This matter came on for hearing before this court on September 11, 1978, in the courtroom of Department 13, before the Honorable Robert H. Green, judge presiding, pursuant to the verified petition of LIBERTARIAN PARTY OF CALIFORNIA, et al., and an Alternative Writ of Mandate and Order to Show Cause having been issued by this court and served on each of the respondents in a manner provided by law. Ray Hendrickson appeared as counsel for petitioners; Deputy Attorney General Christopher C. Foley appeared for Respondent MARCH FONG EU; Deputy County Counsel LON WATSON appeared for Respondent AL OLSON; Respondent KEITH BOYER did not appear but through Deputy County Counsel Anthony Albers submitted the matter upon a response and

argument submitted by Respondent MARCH FONG EU. The court having heretofore signed its written findings of fact and conclusions of law,

IT IS THEREFOR ORDERED THAT:

A peremptory writ of mandate issue under seal of this court, commanding Respondents AL OLSON, Registrar of Voters of Orange County, KEITH BOYER, Acting Registrar of Voters of San Diego County, and MARCH FONG EU, Secretary of State of California, to certify and place on the ballot for the general election to be held November 7, 1978, the name of DAVID BERGLAND, with the political party designation "LIBERTARIAN", as a candidate for the California State Senate from the 36th Senatorial District, and further that,

A peremptory writ of mandate issue under seal of this court, commanding Respondents AL OLSON, Registrar of Voters of Orange County, and MARCH FONG EU, Secretary of State of California, to certify and place on the ballot for the general election to be held November 7, 1978, the name of JIM GALLAGHER, with the political party designation "LIBERTARIAN", as a candidate for the California State Assembly from the 73rd Assembly District.

Dated: .....

.....

Judge of the Superior Court

Approved as to form.

Dated: .....

EVELLE J. YOUNGER
Attorney General
By: .....
CHRISTOPHER FOLEY
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Appeendix D

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Superior Court of the State of California
for the County of Orange

No. 29-73-84

Libertarian Party of California, an unincorporated association; David Bergland; and Jim Gallagher,
Petitioners,

v.

Al Olson, Registrar of Voters of Orange County; Keith Boyer, acting Registrar of Voters of San Diego County; and March Fong Eu, Secretary of State of the State of California,
Respondents.

NOTICE OF APPEAL

Respondent March Fong Eu, Secretary of State of the State of California, appeals from the judgment entered herein on January 5, 1979.

Dated: .....

GEORGE DEUKMEJIAN, Attorney General
L. STEPHEN PORTER,
Assistant Attorney General

HENRY G. ULLERICH,
CHRISTOPHER C. FOLEY,
Deputy Attorneys General

By .....
CHRISTOPHER C. FOLEY
Attorneys for Respondent March Fong Eu, Secretary of State of the State of Cal.

DECLARATION OF SERVICE BY MAIL

Re: LIBERTARIAN PARTY OF CALIFORNIA
v. AL OLSON No. 29-73-84

I am over 18 years of age, and not a party to the within cause; my business address is 800 Tishman Building, 3580 Wilshire Boulevard, Los Angeles, California 90010; I served a copy of the attached

NOTICE OF APPEAL

.....
.....

on each of the following, by placing same in an envelope(s) addressed as follows:

SILLS, DOUGHERTY and HENDRICKSON
Bank of California Building
1401 Dove Street, Suite 600
Newport Beach, California 92660

ANTHONY ALBERS
Deputy County Counsel
County of San Diego
1600 Pacific Coast Hwy., Room 355
San Diego, California 92100

LON WATSON
Deputy County Counsel
County of Orange
515 N. Sycamore
Santa Ana, California 92700

Each said envelope was then, on March 12, 1979, sealed and deposited in the United States Mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 12, 1979, at Los Angeles, California.

LILIA D. DURAN
Lilia D. Duran
Declarant